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January 10, 2003

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JAN 10 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
236 Massachusetts Ave., NE
Suite 110
Washington, DC 20002

Re: Chawanakee Joint Elementary School District
Application for Review
DA 02-3077
File No. SLD-229391
CC Docket No. 96-45
CC Docket No. 97-21

Dear Ms. Dortch:

Transmitted herewith, on behalf of Chawanakee Joint Elementary School District ("Chawanakee"), are an original and four **(4)** copies of its Application for Review of the Wireline Competition Bureau's *Order on Reconsideration* in the above-captioned proceeding.

For the reasons set forth in the Application for Review, Chawanakee requests that the Commission grant the Application for Review and provide the relief requested therein.

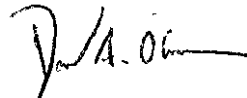
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Marlene H. Dortch, Esq.
January 10, 2003
Page 2

Should you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read "D. A. O'Connor", with a horizontal line extending to the right.

David A. O'Connor
Counsel for Chawanakee Joint Elementary
School District

Enclosure

cc (w/encl.): Universal Service Administrative Company
Schools and Libraries Division
Box 125 – Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981

FCC Commissioners and Staff listed
in Certificate of Service

WAS1 #1096753 v1

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

RECEIVED

In the Matter of)
)
Petition for Reconsideration)
)
Request for Review of the)
Decision of the)
Universal Service Administrator by)
)
Chawanakee Joint Elementary)
School District)
)
Federal-State Joint Board on)
Universal Service)
)
Changes to the Board of Directors)
of the National Exchange Carriers)
Association, Inc.)

DA 02-3077

JAN 10 2003
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

File No. SLD-229391

CC Docket No. 96-45

CC Docket No. 97-21

To: The Commission

APPLICATION FOR REVIEW

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January 10, 2003

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Exhibits

- Exhibit 1: Bureau's *Order on Reconsideration*
- Exhibit 2: Bureau's *Order*
- Exhibit 3: Chawanakee's Petition for Reconsideration
- Exhibit 4: Chawanakee's Request for Review
- Exhibit 5: Chawanakee's Supplement to Request for Review

SUMMARY

Chawanakee Joint Elementary School District (“Chawanakee”) hereby seeks Commission review of the Wireline Competition Bureau’s (the “Bureau’s”) *Order on Reconsideration* in this proceeding. The issues raised in this proceeding are of great importance to the Commission, because the Bureau’s decision has in effect constricted the Commission’s authority to review decisions issued by the Schools and Libraries Division of the Universal Service Administrative Company (“SLD”). The Bureau has held that the Commission does not have authority to conduct *sua sponte* reviews of SLD decisions pursuant to Section 1.117 of the Commission’s rules. Chawanakee urges the Commission to reverse this dangerous precedent and affirm the Commission’s ultimate authority over the universal service program, including the authority to conduct *sua sponte* reviews of SLD decisions pursuant to Section 1.117 of the rules.

Having asserted its jurisdiction in this regard, the Commission should decide the substantive matters raised in Chawanakee’s appeal. Specifically, the Commission should hold that the Paperwork Reduction Act (“PRA”) entitled Chawanakee to appeal an SLD decision during the Commission’s “administrative process”, which process includes the period for *sua sponte* reviews under Section 1.117. Chawanakee submits that the FCC Form 471 used by Chawanakee to file its funding request with the SLD failed to comply with the Office of Management and Budget’s terms of clearance of the FCC Form 471 and, accordingly, Chawanakee was entitled under the PRA to provide any information missing from its application at any time during the administrative process, which Chawanakee has done. Consequently, the Commission should direct SLD to process Chawanakee’s FCC Form 471 application as having been timely filed during the Funding Year 4 filing window.

Because the issues raised in this Application for Review present novel questions of law and policy which will affect the entire operation of the universal service program, Chawanakee urges the Commission to decide these issues in an expeditious manner.

WASI #1150161 v1

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

In the Matter of)	
)	
Petition for Reconsideration	)	DA 02-3077
)	
Request for Review of the)	
Decision of the)	
Universal Service Administrator by)	
 Chawanakee Joint Elementary School District	) )	File No. SLD-229391
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors of the National Exchange Carriers Association, Inc.	) ) )	CC Docket No. 97-21
 To: The Commission		

APPLICATION FOR REVIEW

Chawanakee Joint Elementary School District (“Chawanakee”), by its attorneys and pursuant to Sections 1.115(a), 1.115(c), and 54.722(b) of the rules of the Federal Communications Commission (“Commission”), 47 C.F.R. §§ 1.115(a), (c), 54.722(b), hereby submits this Application for Review of the Wireline Competition Bureau’s (“Bureau’s”) *Order on Reconsideration* released November 12, 2002 in the above-captioned matter.¹ This

¹ Request for Review of the Universal Service Administrator by Chawanakee Joint Elementary School District, CC Docket Nos. 96-45 and 97-21, Order on Reconsideration, DA 02-3077 (WCB rel. Nov. 12, 2002) (“*Order on Reconsideration*”), *affirming* Request for Review of the Universal Service Administrator by Chawanakee Joint Elementary School District, CC Docket Nos. 96-45 and 97-21, Order, DA 02-1211 (WCB rel. May 23, 2002) (“*Order*”). Copies of the Bureau’s Order on Reconsideration and Order are attached hereto as Exhibits 1 and 2, respectively.

Application for Review is timely filed pursuant to the Commission's procedural rules.²

I. Questions Presented for Review.³

The initial question presented to the Commission is whether the Bureau erred in concluding that a decision of the Administrator of the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") is not an action "'taken pursuant to delegated authority' under Section 1.117 [of the Commission's rules]."⁴ For the reasons set forth below, Chawanakee submits that the SLD has been delegated its authority by the Commission and that the Commission therefore has authority to review such decisions on its own motion pursuant to Section 1.117 of the Commission's rules and Section 5(c)(4) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 155(c)(4).

Assuming that the Commission has authority to conduct *sua sponte* reviews of SLD decisions within the forty-day period permitted by Section 1.117 of the Commission's rules, the second question presented for review is whether the Paperwork Reduction Act ("PRA")⁵ entitled

² See *Implementation of Interim Filing Procedures for Filings of Requests for Review*, Order, CC Docket No. 96-45, FCC 01-376, 67 Fed. Reg. 3441 (Jan. 24, 2002) (extending the period for filing an Application for Review arising from a Request for Review from 30 days to 60 days).

³ See 47 C.F.R. § 1.115(b)(1).

⁴ *Order on Reconsideration*, para. 6.

⁵ The relevant provisions of the PRA provide as follows:

(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information . . . if—

(1) the collection of information does not display a valid control number assigned by the Director [of the Office of Management and Budget ("OMB")] or

(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

(continued...)

Chawanakee to file its pleading during the Commission’s “administrative process”⁶ and if so, whether the “administrative process,” for purposes of the PRA, included the Commission’s *sua sponte* review period under Section 1.117.⁷ Finally, the Commission should decide whether the FCC Form 471 used by Chawanakee to file its funding request failed to comply with the terms of clearance issued by the Office of Management and Budget (“OMB”) in connection with OMB’s approval of FCC Form 471. In its initial Request for Review, Chawanakee argued that the FCC Form 471 filed electronically by Chawanakee did not comply with OMB’s terms of clearance, and that pursuant to the PRA Chawanakee was permitted to supply any information missing from its application at any time during which Chawanakee’s application remained within the administrative process. Chawanakee urges the Commission to address all of these questions and to determine that Chawanakee’s application should be approved in full by the SLD.

II. Factors Warranting Commission Consideration of the Questions Presented.⁸

The questions presented in this Application for Review are novel questions of law and policy, and the Commission has reserved consideration of such questions to itself.’ The questions presented are of considerable importance to the Commission, because the Bureau’s decision has in effect constricted the Commission’s authority to review decisions issued by the

(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

44 U.S.C. § 3512(a)-(b); *see also* Saco River Cellular, Inc. v. FCC, 133 F.3d 25, 33 (D.C. Cir. 1998), *cert. denied sub nom.* Northeast Cellular Telephone Co. v. FCC, 525 U.S. 813 (1998).

⁶ *Id.* § 3512(b).

⁷ *See* Chawanakee Petition for Reconsideration at 2-4 and Chawanakee Request for Review at 2-5, copies of which are attached hereto as Exhibits 3 and 4, respectively. The exhibits to the Petition for Reconsideration and Request for Review have been redacted but are available upon request.

⁸ *See* 47 C.F.R. § 1.115(b)(2)

⁹ *See* 47 C.F.R. § 54.722(a)

SLD. Moreover, if the Bureau is correct that SLD does not act pursuant to authority delegated from the Commission, then SLD lacks any statutory authority to carry out its functions, and all actions of SLD are and have been void *ab initio*. Therefore, Chawanakee urges the Commission to reverse the Bureau's decision and direct the SLD to grant Chawanakee's Funding Year 4 application in full.

III. Background.''

Chawanakee electronically filed and certified its funding request for Year 4¹¹ of the E-rate program on January 17, 2001. However, at that time the **SLD** required applicants to submit an original signature page to SLD even though applicants were permitted to sign the FCC Form 471 request electronically, as Chawanakee had done. The original signature page and Item 21 attachments were sent to SLD via Federal Express on January 19, 2001, one day after the filing window closed.

By a postcard dated July 10, 2001, SLD notified Chawanakee that its application was received after the filing window had closed. On July 26, 2001, Chawanakee filed a Letter of Appeal with the SLD, which was denied by the **SLD** Administrator on August 5, 2001.

Chawanakee filed a Request for Review of the Administrator's decision with the Bureau on September 6, 2001, the thirty-first day after the Administrator's decision.''' Although the thirty-day deadline for filing such an appeal had passed, Chawanakee argued that, procedurally, the Commission retained jurisdiction over the proceeding because the Commission was authorized to review the decision of the Administrator on the Commission's own motion until

¹⁰ More detailed background information is provided in Chawanakee's Petition for Reconsideration and Request for Review.

¹¹ Now referred to as Year 2001; *see Order on Reconsideration* 1 n.2.

¹² A Supplement to the Request for Review was filed on October 23, 2001, a copy of which is attached hereto as Exhibit 5. The exhibits submitted with the Supplement have been redacted but are available upon request. In order to expedite processing of Chawanakee's application, Chawanakee requests that the Commission also resolve the issues presented in the Supplement.

September 17, 2001 pursuant to Section 1.117(a) of its rules.” Because the Commission retained jurisdiction over the proceeding, Chawanakee argued that, notwithstanding any other provision of law, the PRA entitled Chawanakee to present its appeal at any time during the agency administrative process, including the forty-day period specified in Section 1.117(a). Substantively, Chawanakee argued that the Commission’s FCC Form 471 violated the PRA because the Commission had failed to comply with the OMB’s terms of clearance of FCC Form 471 by failing to display information required by OMB. Because of this violation of the PRA, Chawanakee argued that the provisions of the PRA entitled Chawanakee to provide any information missing from its January 17, 2001 application at any time during the Commission’s administrative process. Chawanakee did so on January 19, 2001, while the administrative process continued. Accordingly, Chawanakee requested that the Bureau reverse the decision of the Administrator and instruct SLD to accept Chawanakee’s application as having been timely filed.

The Bureau rejected Chawanakee’s arguments in the *Order* and in the *Order on Reconsideration*. In the *Order on Reconsideration*, the Bureau ruled that SLD does not act pursuant to delegated authority for purposes of Section 1.117 of the rules. Because of this ruling, the Bureau determined that it was unnecessary for the Bureau to determine whether this proceeding remained ongoing for purposes of the PRA by virtue of the Commission’s right to review *sua sponte* the SLD’s decision for forty days after the SLD’s decision.¹⁴ Chawanakee now submits this timely appeal of the Bureau’s decision.

¹³ See Request for Review at 4 n.10; Petition for Reconsideration at 2-4.

¹⁴ *Order on Reconsideration* n.10.

IV. The Commission Is Authorized to Review SLD Decisions Pursuant to Section 1.117 of the Commission's Rules and Section 5(c)(4) of the Act.

The Bureau has held that the Commission is without authority to review, on its own motion, a decision issued by the SLD. Chawanakee submits that the Bureau's determination is inconsistent with the Act and the Commission's orders establishing review procedures for USAC decisions. Moreover, Chawanakee notes that if the Bureau's interpretation is correct that SLD does not act pursuant to authority delegated from the Commission, then SLD has not been delegated any authority from the Commission and SLD lacks any statutory authority to carry out its functions; accordingly, all actions of SLD are and have been void *ab initio*. Chawanakee disagrees with this interpretation and urges the Commission to confirm its delegation of authority to SLD, its jurisdiction over SLD decisions, and its plenary authority over the administration of the universal service program.

The Commission's power to delegate its statutory authority derives from Section 5(c) of the Act, which provides that: "When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions [except those not at issue here] to a panel of commissioners, an individual commissioner, and employee board or an individual employee"¹⁵

Chawanakee submits that even though USAC and SLD are not FCC commissioners or employees, USAC and SLD nonetheless have been delegated authority by the Commission and their actions are therefore subject to *sua sponte* review by the Commission for up to forty days after an SLD decision has been issued, pursuant to Section 1.117(a) of the Commission's rules.

The Telecommunications Act of 1996 did not prescribe a structure for administering the universal service program. In ordering the establishment of USAC and the SLD, the

Commission determined that SLD would "bring to the administration of the schools and libraries

¹⁵ 47 U.S.C. § 155(c)(1).

[program] the necessary expertise” to ensure that the program would be administered efficiently and in the best interests of its intended beneficiaries.¹⁶ Thus, the Commission was delegating its specific congressional authority to implement the universal service provisions of Section 254(h) to USAC and SLD in order to ensure the proper functioning of the Commission and the prompt and orderly conduct of its business. This is exactly the type of authority delegation contemplated under Section 5(c) of the Act. When Congress enacted the Telecommunications Act of 1996, it specifically ordered the Commission to promulgate rules to implement the universal service provisions of Section 254(h).¹⁷ The Commission has interpreted Section 254(h) to permit the Commission to delegate these functions to USAC and SLD,¹⁸ and the Commission has so delegated its authority.” SLD is carrying out government functions, is operating under the Commission’s orders, and is directly accountable to the Commission. The fact that Section 5(c) of the Act does not specifically provide for delegation of authority to an entity such as USAC should not bar the Commission from delegating its authority to USAC.

Rather, the provisions of Section 5(c) which authorize the Commission to delegate its authority to commissioners and employees are intended to be an indicative, and not an exhaustive, list of the Commission’s authority to delegate its powers provided by Congress, and certainly these provisions were not intended to be a limitation on the Commission’s reviewing

¹⁶ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, Report and Order and Second Order on Reconsideration, CC Dockets No. 97-21, 96-45, FCC 97-253, 12FCC Rcd 18,400, para. 2 (1997). Pursuant to congressional mandate, the Commission later merged SLD’s predecessor into USAC. See Conference Report on H.R. 3579, H.R. Rept. No. 105-504.

¹⁷ 47 U.S.C. § 254(h)(2).

¹⁸ See *Changes to the Board of Directors of the National Exchange Carriers Association, Inc.; Federal-State Joint Board on Universal Service*, Third Report and Order in CC Docket No. 97-21, Fourth Report and Order on Reconsideration in CC Docket No. 97-21 and Eight Order on Reconsideration in CC Docket No. 96-45, FCC 98-306, 13FCC Rcd 25,058, para. 14 (1998) (“Third Report and Order”).

¹⁹ See *id.* paras. 2, 20.

authority. Section 5(c) is the only provision of the Act that would allow non-Commission employees to carry out the Commission’s functions.” Indeed, if the Bureau’s position that the SLD does not act under delegated authority is accepted, then the Commission had no authority to delegate its authority to SLD, and any actions taken by the SLD are and have been void *ab initio*.” There is no question that certain Commission functions have been delegated to SLD. The Commission therefore has necessarily expanded the scope of entities to whom authority may be delegated pursuant to Section 5(c)(1).

Accordingly, Section 5(c)(1) of the Act contemplates the delegation of authority to an entity such as the SLD, and the Commission is therefore entitled to review on its own motion any SLD decision pursuant to Section 5(c)(4), as promulgated under Section 1.117(a) of the Commission’s rules. The Commission cannot disclaim authority to conduct *sua sponte* reviews of decisions delegated to non-employee entities — it must retain the same, if not more, authority

²⁰ The Commission appears to have taken the position that it derives authority to direct the establishment of USAC and SLD from Section 4(i) of the Act, 47 U.S.C. § 154(i). See *Third Report and Order* para. 14. Whatever the source of the Commission’s authority to order the establishment of USAC and SLD, the Commission certainly retained the authority to conduct a *sua sponte* review of an SLD Administrator’s decision on the thirty-first day after the Administrator’s decision. Section 1.117 of the rules does not limit the Commission’s authority to review decisions issued pursuant to Section 5(c) delegated authority; rather, Section 1.117 authorizes the Commission to review *any* delegated authority decision, including decisions issued by an entity established pursuant to the Commission’s powers under Section 4(i). In addition, Section 0.201 sets forth the Commission’s delegations pursuant to Section 5(c). SLD is not included in Section 0.201. However, there can be no doubt that the Commission has delegated its authority under Section 254(h) to SLD. There is no other authority given to SLD other than that given by the Commission. Therefore, SLD is acting “pursuant to delegated authority” of the Commission for purposes of Section 1.117.

²¹ Chawanakee is not arguing that the Commission lacked authority to establish USAC and SLD, although this issue was raised by the General Accounting Office. See *FCC Lacked Authority to Create Corporations to Administer Universal Service Programs*, GAO/T-RCED/OGC-98-84 (rel. Mar. 31, 1998). Apparently the Commission has requested, but has not received, from Congress specific statutory authority to establish USAC and SLD. See *Third Report and Order* para. 21.

to review those decisions on its own motion as it has to review the decisions of employees that have been delegated authority.

The Commission has repeatedly reiterated its plenary authority over the universal service support mechanisms and the universal service administrator. In *its* 1998 Report to Congress, the Commission stated that it “retains ultimate authority over the operation of the support mechanisms [and that] [p]arties that object to any action taken by the [Administrator] can bring the matter to Commission’s attention and request remedial relief.”²² Clearly, then, the Administrator of the support mechanisms operates pursuant to authority delegated to it by the Commission, since the Commission retains plenary authority over the universal service fund and since the Administrator lacks any authority to act other than by the authority granted to it by the Commission. Consequently, the Commission is authorized to review any decision by the SLD pursuant to Section 1.117 of the Commission’s rules.

V. The Bureau Lacks Authority to Review Novel Questions of Law and Policy.

In any event, the Bureau should have referred Chawanakee’s appeal to the full Commission initially, because Chawanakee’s appeal raises novel questions of law and policy for which the Bureau has not been delegated authority to review.²³ As stated in the *Third Report and Order*, “Petitions that raise novel questions of fact, law or policy shall be brought before the full Commission.”²⁴ In this case, Chawanakee has argued that the PRA entitles Chawanakee to

²² *Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579*, Report to Congress, FCC 98-85, para. 9 (1998); see also *Third Report and Order*, para. 17 (“[T]he Commission retains ultimate control over the operation of the federal universal support mechanisms through its authority to establish the rules governing the support mechanisms and through its review of administrative decisions that are appealed to the Commission.”).

²³ *Third Report and Order*, para. 68.

²⁴ *Id.*; see also 47 C.F.R. § 54.722(a). Indeed, Chawanakee captioned its appeal of the Bureau’s May 23, 2002 Order as an Application for Review by the full Commission, but stated that the appeal could be treated as a Petition for Reconsideration. In its *Order on Reconsideration*, the (continued...)

raise its arguments at any time during the administrative process, and that the “administrative process” extends until the time for *sua sponte* Commission review has expired under Section 1.117 of the Commission’s rules. Chawanakee’s substantive arguments concerning the PRA also raise questions of first impression for the Commission. Finally, the Bureau has raised the additional novel issue of whether the SLD acts pursuant to delegated authority. All of these issues present novel questions of law and policy, and therefore the appeal should not have been reviewed by the Bureau but rather by the full Commission. Chawanakee urges the Commission to address all of the novel questions raised in this proceeding due to their importance in connection with the proper functioning of the entire universal service program.

VI. The Commission’s Authority to Review SLD Decisions and Bureau Decisions Is Not Redundant.

The Bureau also appears to have ruled that the Commission lacks authority to review SLD decisions pursuant to Section 1.117 because Part 54 of the rules contains no language corresponding to the language contained in Section 1.106 and 1.115 regarding Commission review of actions taken pursuant to delegated authority. Chawanakee submits that the absence of corresponding language in Part 54 is not dispositive, and certainly does not demonstrate that the Commission lacks authority to review SLD decisions pursuant to Section 1.117. The Commission has clearly delegated its authority to administer the universal service program to SLD and USAC.²⁵ However, as the Commission has repeatedly stated, it retains ultimate authority over the administration of the universal service program,²⁶ and this includes the authority to conduct *sua sponte* reviews of any actions taken by SLD. Such *sua sponte* reviews

Bureau treated Chawanakee’s pleading as a Petition for Reconsideration. *Order on Reconsideration* n.1.

²⁵ See *Third Report and Order* paras. 2, 20.

²⁶ See, e.g., *id.* para. 14.

must necessarily be covered by Section 1.117 because **SLD** is acting pursuant to authority delegated by the Commission. Accordingly, the Commission should reject the Bureau's argument.

The Commission should also reject the Bureau's apparent suggestion that the Commission's addition of Section 54.719 to the rules, rather than the amendment of Section 1.106 or 1.115 of the rules, in some way indicates that the **SLD** does not act pursuant to delegated authority.²⁷ Chawanakee submits that the Bureau's conclusion infers too much. However the delegation of Commission authority to **SLD** is viewed, and regardless of whether **SLD**'s actions are reviewed under 1.106, 1.115 or 54.719, the Commission retains authority pursuant to Section 1.117 to review, on its own motion, any action taken by **SLD**, since such actions are taken pursuant to authority delegated by the Commission. Moreover, the Commission has specifically cross-referenced Sections 54.719 and 54.722(b) with the Commission's appellate review procedures under ~~Part~~ 1 of the rules, thus confirming that **SLD** acts pursuant to delegated authority and that any **SLD** decision may be reviewed by the Commission on its own motion pursuant to Section 1.117(a) of the rules.²⁸

VII. Conclusion.

WHEREFORE, for the reasons set forth above, Chawanakee urges the Commission to: 1) reverse the Bureau's *Order on Reconsideration*; 2) affirm the Commission's jurisdiction over **SLD** and affirm that **SLD** acts pursuant to authority delegated by the Commission; 3) hold that the provisions of the PRA entitled Chawanakee to file its Request for Review during the Commission's *sua sponte* review period under Section 1.117; 4) hold that the Commission did not properly comply with OMB's terms of clearance of FCC Form 47 1; and, accordingly, 5)

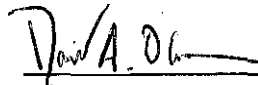
²⁷ See Order on Reconsideration, para. 6.

²⁸ See 47 C.F.R. §§ 54.719(c), 54.722(b)

direct SLD to process Chawanakee's Year 4 funding request as having been timely filed during the filing window, and provide such other relief as may be deemed necessary and proper by the Commission.

Respectfully submitted,

Chawanakee Joint Elementary School District

A handwritten signature in dark ink, appearing to read "David A. O'Connor", is written over a horizontal line.

Alan Y. Naftalin

Mark J. Palchick

David A. O'Connor

HOLLAND & KNIGHT LLP

2099 Pennsylvania Ave., N.W., Suite 100

Washington, DC 20006

(202) 955-3000

Its Attorneys

Dated: January 10, 2003

CERTIFICATE OF SERVICE

I, Laura Ledet, an employee of Holland & Knight LLP, hereby certify that on January 10, 2003, I caused a copy of the foregoing Application for Review to be delivered via first-class mail, postage prepaid to the following:

Chairman Michael K. Powell*
Federal Communications Commission
445 Twelfth St. SW
Washington, DC 20554

Commissioner Kathleen Q. Abernathy*
Federal Communications Commission
445 Twelfth St. SW
Washington, DC 20554

Commissioner Michael J. Copps*
Federal Communications Commission
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Washington, DC 20554

Commissioner Kevin J. Martin*
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Universal Service Administrative Company
Schools and Libraries Division
Box 125 –Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981



Laura Ledet

* Via Hand Delivery

WAS1 #1148218 v4

EXHIBIT 1



Federal Communications Commission
Washington, D.C. 20554

Memo

To: David A. O'Connor
Counsel for Chawanakee Joint Elementary School District

From: Mark G. Seifert, Deputy Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

Date: November 15, 2002

Re: DA 02-3077, Released November 12, 2002

Please find accompanying this memo the Commission's decision on your Request for Review. The accompanying decision may be referenced in the future by its Proceeding Number and release date: **DA 02-3077**, November 12, 2002.

If you are not satisfied with this decision, you may file a petition for reconsideration with the Commission within 30 days of the release date of the decision.¹ However, the petition will generally be granted only if it demonstrates an error in the decision based upon (1) facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (2) facts unknown to petitioner until after the Request for Review was filed and which could not, through the exercise of ordinary diligence, have been learned prior to that time.² Petitions for reconsideration are decided by the Wireline Competition Bureau of the Commission.

You may also file an application for review with the Commission if you are displeased with this decision. Your application for review must be filed within 60 days of the release date of the decision pursuant to section 1.115(c) of our rules. Please note that the application for review will not be granted if it relies on questions of fact or law upon which the designated

¹ See 47 C.F.R. § 1.106(f).

² See 47 C.F.R. § 1.106(b)(2).

authority has been afforded no opportunity to pass.³ Applications for review are decided by the full Commission.

Petitions for reconsideration and applications for review should be submitted to the Secretary, Federal Communications Commission, Washington, D.C., 20554, they should reference CC Docket No. 02-6 as well as the Proceeding Number of the decision from which relief is sought, and should otherwise conform to the requirements the Commission's rules.⁴

If you have any questions regarding the foregoing, feel free to contact the Telecommunications Access Policy Division at (202) 418-7400.

cc: Craig Treber, Technology Director
Chawanakee Joint Elementary School District

³ See *Implementation of Interim Filing Procedures for Filings of Requests for Review*, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order, FCC-376, 17 FCC Rcd 339 (2002). See 47 U.S.C. § 1.115(c).

⁴ See 47 C.F.R. § 1.106, 1.115.

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Petition for Reconsideration)	
)	
Request for Review of the)	
Decision of the)	
Universal Service Administrator by)	
)	
Chawanakee Joint Elementary School District	)	File No. SLD-229391
North Fork, California)	
)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors of the	)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	

ORDER ON RECONSIDERATION

Adopted: November 8, 2002

Released: November 12, 2002

By the Wireline Competition Bureau:

1. Before the Wireline Competition Bureau is a Petition for Reconsideration filed by Chawanakee Joint Elementary School District (Chawanakee), North Fork, California.¹ In its Petition, Chawanakee seeks reconsideration of our decision dismissing its request for review of the rejection of its Funding Year 2001 application for universal service discounts by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company.² In our

¹ *Petition for Reconsideration by Chawanakee Joint Elementary School District*, CC Docket Nos. 96-45 and 97-21, Petition for Reconsideration, filed June 20, 2002 (Petition for Reconsideration). Although the pleading is captioned as an application for review by the Full Commission pursuant to 47 C.F.R. § 1.115, Chawanakee also states that the appeal may be treated as a petition for reconsideration pursuant to 47 C.F.R. § 1.106. Petition For Reconsideration at n.8.

² See *Request for Review of the Decision of the Universal Service Administrator By Chawanakee Joint Elementary School District*, CC Docket Nos. 96-45 and 97-21, Request for Review, filed September 6, 2001 (Request For Review). Previously, this funding period would be referred to as Funding Year 4. Funding periods are now described by the year in which the funding period starts. Thus the funding period which began on July 1, 2001 and ends on June 30, 2002 is now called Funding Year 2001. The funding period which began on July 1, 2002 and ends on June 30, 2003, previously described as Funding Year 5, is now called Funding Year 2002, and so on.

decision, we dismissed the Request for Review as untimely.³ Chawanakee asserts that the request for review is timely under Commission regulations and the provisions of the Paperwork Reduction Act (PRA).⁴ For the reasons set forth below, we deny the Petition for Reconsideration

2. At issue is SLD's final decision on Chawanakee's Funding Year 2001 application for discounts, which SLD issued on August 6, 2001.⁵ Section 54.720 of the Commission's rules requires requests for review of all Administrator decisions to be filed within 30 days of the issuance of the decision. Chawanakee did not file its Request for Review with the Commission until 31 days after the issuance of SLD's decision, but argued that *the* request for review was timely because Chawanakee's arguments rested on the legal protections provided to persons under section 3512 of the Paperwork Reduction Act (PRA) in connection with federal collections of information.⁶ Section 3512(b) of the PRA provides that "[t]he protection provided by this section may be raised . . . at any time during the agency administrative process or judicial action applicable thereto."

3 We found that this provision did not save *the* request for review because section 3512(b) permitted PRA arguments to be raised only where a proceeding was "ongoing." Because the 30-day period for filing a request for review of the Administrator's decision had elapsed, we concluded, the instant proceeding was not ongoing.⁷

4. In its Petition for Reconsideration, Chawanakee does not dispute that a PRA argument may only be raised in an ongoing proceeding.⁸ It argues, however, that the instant proceeding was ongoing at the time when it filed its Request for Review because of section 1.117 of the Commission's rules.⁹ Section 1.117 provides that, "[w]ithin 40 days after public notice is given of any action taken pursuant to delegated authority, the Commission may on its own motion order the record of the proceeding before it for review."¹⁰ Chawanakee argues that,

³ See *Request for Review by Chawanakee Joint Elementary School District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File Nu. SLD-229391, CC Dockets No. 96-45 and 97-21, Order, DA 02-1211 (Wireline Comp. Bur. rel. May 23, 2002) (*Chawanakee Order*).

⁴ See Petition for Reconsideration.

⁵ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Craig Treber, Chawanakee Joint School District. dated August 6, 2001.

⁶ See Paperwork Reduction Act (PRA), 44 U.S.C. § 3501 *et seq.*

⁷ 44 U.S.C. § 3512(b)

⁸ *Chawanakee Order*, para. 5

⁹ *Id.*

¹⁰ Petition at 4.

¹¹ *Id.* at 3-4

"47 C.F.R. § 1.117(a).

within this 40-day period, the Commission “retains jurisdiction” and therefore, the administrative proceeding is ongoing.¹³ Chawanakee further argues that this 40-day period is applicable to SLD’s rejection of Chawanakee’s application because “SLD was acting pursuant to delegated authority.”¹⁴ Because Chawanakee submitted its Request for Review within 40 days of the relevant SLD decision, it argues, it submitted its Request for Review while the proceeding was ongoing and its PRA argument must be considered on the merits.”

5. We find, however, that the 40-day period provided under section 1.117 for *sua sponte* Commission review of actions taken pursuant to delegated authority is not applicable to the SLD decision on appeal because an SLD decision is not an action taken “pursuant to delegated authority” for purposes of section 1.117.¹⁶ The meaning of the term “delegated authority” is provided by section 5(c)(1) of the Act, which provides that the Commission may “delegate any of its functions [with certain exceptions] to a panel of commissioners, an individual commissioner, an employee board, or an individual employee.”¹⁷ Neither the Administrator nor SLD qualifies as a commissioner, employee or board of employees of the Commission. Thus, the authority granted to it under Commission rules does not constitute “delegated authority” for purposes of section 1.117.

6. Further, to interpret actions taken pursuant to “delegated authority” in section 1.117 as including SLD decisions would be unreasonable in light of the use of that term in sections 1.106 and 1.115. These sections provide, respectively, that a party may file with the Commission a petition for reconsideration of “actions taken pursuant to delegated authority” or an Application for Review by the full Commission of “an action taken pursuant to delegated authority.”¹⁸ Indeed, if Chawanakee were correct, the request for review provided by section 54.719 as an avenue to appeal Administrator decisions would be redundant, because a party seeking Commission review of an SLD decision could file a petition for reconsideration or application for review pursuant to section 1.106 or 1.115. Thus, Chawanakee’s interpretation is plainly unreasonable and inconsistent with our rules. We conclude that SLD actions are not actions “taken pursuant to delegated authority” under section 1.117. Because section 1.117’s 40-day period for *sua sponte* review did not apply to the SLD decision, the relevant administrative proceeding was not ongoing when Chawanakee filed its appeal of that decision after the expiration of the 30-day appeal period, and the request for review was thus correctly dismissed as untimely under the Commission’s rules.

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ *Id.* at 3-4

¹⁶ We therefore need not decide whether a Commission proceeding otherwise resolved is still “ongoing” for PRA purposes solely because of the possibility that the Commission *may* exercise its discretion under section 1.117 to review an action.

¹⁷ 5 U.S.C. § 155(c)(1). *See also* 47 C.F.R. §§ 0.11(c), 0.201(a) (listing the three basic categories of delegations “pursuant to section 5(c)”).

¹⁸ 47 C.F.R. §§ 1.106(a)(1), 1.115(a).

FEDERAL COMMUNICATIONS COMMISSION

4

EXHIBIT 2

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Request for Review of the)	
Decision of the)	
Universal Service Administrator by)	
)	
Chawanakee Joint Elementary School District	)	File No. SLD-229391
North Fork, California)	
)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors of the	)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	

ORDER

Adopted: May 20,2002

Released: May 23,2002

By the Wireline Competition Bureau:

1. This Order dismisses the Request for Review filed by Chawanakee Joint Elementary School District (Chawanakee), North Fork, California.¹ Chawanakee seeks review of a decision issued by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator) on August 6, 2001.² The Commission received Chawanakee's Request for Review on September 6, 2001.³ For requests seeking review of decisions issued before August 13, 2001, under section 54.720(b) of the Commission's rules, any such appeal must be filed with the Commission or SLD within 30 days of the issuance of the decision that the party seeks to have reviewed.⁴ Documents are considered to be filed with the Commission only upon receipt.⁵ The 30-day deadline contained in section 54.720(b) of the

¹ *Request for Review of the Decision of the Universal Service Administrator by Chawanakee Joint Elementary School District*, CC Docket Nos. 96-45 and 97-21, Request for Review, filed September 6, 2001 (Request for Review).

² See Request for Review; Letter from Schools and Libraries Division, Universal Service Administrative Company, to Craig Treber, Chawanakee Joint School District, dated August 6, 2001 (Administrator's Decision on Waiver Request). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

³ See Request for Review.

47 C.F.R. § 54.720(b).

⁵ 47 C.F.R. § 1.7.

Commission's rules applies to all such requests for review filed by a party affected by a decision issued by the Administrator.⁶

2. Chawanakee argues that it did not receive the Administrator's Decision on Waiver Request until at least August 13, 2001.⁷ However, this does not demonstrate that the Request for Review is timely because the 30-day period is measured from the date of issuance, not the date of receipt.⁸

3. Chawanakee also argues that its Request for Review should be considered without regard to whether it was filed within the 30-day appeal period because Chawanakee's argument rests on the legal protections provided to persons under section 3512 of the Paperwork Reduction Act (PRA) in connection with federal collections of information? Chawanakee argues that its application was rejected for failure to comply with a collection of information that was unlawful under the requirements of section 3512 of the PRA.¹⁰ Chawanakee asserts that this argument may be raised even though the 30-day period for filing a Request for Review has passed, pointing to section 3512(b) of the PRA, which provides that "[t]he protection provided by this section may be raised . . . at any time during the agency administrative process or judicial action applicable thereto."

4. In *Saco River Cellular, Inc. v. Federal Communications Commission*, the D.C. Circuit affirmed the Commission's determination in *Portland Cellular Partnership* that section 3512(b) allows an affected party to raise PRA violations at any time in an ongoing administrative proceeding, *i.e.*, so long as "the administrative or judicial process in connection with a particular license or with a particular application continues."¹¹ As a result, a PRA argument may not be waived by a party that does not raise the argument at the first opportunity.⁹ However, the party

⁶ We note that, due to recent disruptions in the reliability of the mail service, the 30-day appeal period has been extended by an additional 30 days for requests seeking review of decisions issued on or after August 13, 2001. *See Implementation of Interim Filing Procedures for Filings of Requests for Review, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 01-376 (rel. Dec. 26, 2001), as corrected by *Implementation of Interim Filing Procedures for Filings of Requests for Review, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata (Com. Car. Bur. rel. Dec. 28, 2001 and Jan. 4, 2002). Because the Administrator's Decision on Waiver Request was issued before August 13, 2001, the extended appeal period does not apply to Chawanakee.

⁷ Request for Review, at n.5

⁸ 47 C.F.R. § 54.720

⁹ *See* Paperwork Reduction Act (PRA), 44 U.S.C. § 3501 *et seq.*

¹⁰ Request for Review, at 2-5.

¹¹ *See Saco River Cellular, Inc. v. Federal Communications Commission*, 133 F.3d 25, 30-31 (D.C. Cir. 1998); *Portland Cellular Partnership*, 11 FCC Rcd 19997, 20003, paras. 15-16 (1996).

¹² *See Portland Cellular Partnership*, 11 FCC Rcd at 20002-03, para. 14 ("Section 3512 may be raised at any time during the life of the matter. The protection cannot be waived. Failure to raise them at an early stage does not preclude later assertion of rights under this section, regardless of any agency or judicial rules to the contrary.") (quoting 141 CONG. REC. S5274-75 (Apr. 6, 1995) (statement of Sen. Roth)).

is still required to raise the PRA argument while an administrative or judicial proceeding is “ongoing.” In *Portland Cellular Partnership*, which involved a proceeding to adjudicate competing applications to provide cellular service, the Commission had found that the licensing proceeding was still ongoing when the PRA argument was raised because a timely filed petition for reconsideration of the merits of the Commission’s license award was still pending.¹³

5. Here, in contrast, the administrative proceeding ceased to be ongoing when the time for appeal of the Administrator’s Decision expired without any appeal having been filed. The subsequent filing of an appeal after the matter is closed cannot be considered to constitute part of the ongoing proceeding. If it were, then the requirement that the proceeding be “ongoing” would be meaningless. Therefore, we find that Chawanakee is not entitled to raise a PRA challenge to the application decision, and the Request for Review must be dismissed as untimely in accordance with Commission regulations.

6. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Request for Review filed by Chawanakee Joint Elementary School District, North Fork, California, on September 6, 2001 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey
Deputy Chief, Wireline Competition Bureau

¹³ *Portland Cellular Partnership*, 11 FCC Rcd at 19999-20000, paras. 7, 9 (noting that Port Cell’s timely filed petition for reconsideration regarding the grant of license application ~~was~~ still pending); *id.*, 11 FCC Rcd at 2003, para. 16 (“We **do** not agree . . . that Port Cell is raising its PRA defense outside of the administrative process. Port Cell’s petition for reconsideration is still pending before **us**, and therefore the administrative process for licensing and operating the cellular system to serve the Portland NECMA is ongoing. Consequently, Port Cell’s motion raising Section 3512 relates to an on-going administrative process.”).

EXHIBIT 3

Law Offices

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To Holland & Knight LLP

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June 20, 2002

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VIA HAND DELIVERY

JUN 20 2002

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
236 Massachusetts Ave., NE
Suite 110
Washington, DC 20002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Chawanakee Joint Elementary School District
Application for Review
File No. SLD-229391
CC Docket Nos. 96-45, 97-21
Billed Entity No. **144045**
Form **471** Application **No. 229391**

Dear Ms. Dortch

Transmitted herewith, on behalf of Chawanakee Joint Elementary School District ("Chawanakee"), are an original and four (4) copies of its Application for Review. For the reasons set forth in the Application for Review, Chawanakee requests that the Commission grant the Application for Review and resolve the issues raised in Chawanakee's Request for Review filed on September 6, 2001.

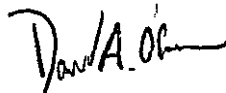
An extra copy of this filing is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

Marlene H. Dortch, Esq.
June 20, 2002
Page 2

Should you have any questions concerning this matter, please *contact* the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read "David A. O'Connor".

David A. O'Connor
Counsel for Chawanakee Joint Elementary
School District

Enclosure

cc: Universal Service Administrative Company
Schools and Libraries Division
Box 125 – Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981

WAS1 #1096753 v1

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

In the Matter of)	
Request for Review by)	
)	
Chawanakee Joint Elementary)	
School District	)	File No. SLD-229391
)	
of Decision of Universal Service)	
Administrator)	
)	
Federal-State Joint Board on	)	CC Docket No. 96-45
universal Service)	
)	
Changes to the Board of Directors	)	CC Docket No. 97-21
of the National Exchange Carriers)	
Association, Inc.)	

To: The Commission

Re: Chawanakee Joint Elementary School District, Billed Entity Number 144045
Form 471 Application Number 229391, Funding Year 4, 7/1/2001- 6/30/2002

APPLICATION FOR REVIEW

Chawanakee Joint Elementary School District ("Chawanakee"), by its attorneys and pursuant to Sections 1.104(b), 1.115, and 54.722(b) of the rules of the Federal Communications Commission ("Commission"), 47 C.F.R. §§ 1.104(b), 1.115, 54.722(b), hereby submits this Application for Review of the Wireline Competition Bureau's ("Bureau's") **Order** released May 23, 2002 in the above-captioned matter.¹ This Application for Review is timely filed pursuant to the Commission's rules. See 47 C.F.R. § 1.115(d).

¹ Request for Review of the Universal Service Administrator by Chawanakee Joint Elementary School District, CC Docket Nos. 96-45 and 97-21, Order, DA 02-1211 (WCB rel. May 23, 2002) ("**Order**"). A copy of the Bureau's decision is attached hereto as Exhibit 1.

In the **Order**, the Bureau dismissed Chawanakee's Request for Review: stating that the Request was not filed during the 30-day window specified in the Commission's rules for such appeals.³ However, Chawanakee's Request was based on the provisions of the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3501 *et seq.* Therefore, the applicable deadline for filing such an appeal is set forth in the PRA, which expressly overrules the due date set forth in ~~Part~~ 54 of the Commission's rules, 47 C.F.R. § 54.720.

Requests for relief under the PRA provisions cited in Chawanakee's appeal may be raised "at any time during the agency administrative process" and "[n]otwithstanding any other provision of law" 44 U.S.C. § 3512(a)-(b).⁴ The question, therefore, is whether the appeal was filed during the Commission's administrative process.

The relevant administrative process is set forth in Section 1.117 of the Commission's rules, 47 C.F.R. § 1.117.⁵ Pursuant to Section 1.117, within forty days after public notice of any action taken pursuant to delegated authority, the Commission may on its own motion order the record of the proceeding before it for review. 47 C.F.R. § 1.117; *see also* Chawanakee Request for Review, at 4n.10 (citing Section 1.117). For purposes of the PRA, therefore, the Commission's administrative process does not conclude until the forty-first day after action has been taken pursuant to delegated authority.

² Request for Review of the Decision of the Universal Service Administrator by Chawanakee Joint Elementary School District, CC Docket Nos. 96-45 and 97-21, Request for Review (filed September 6, 2001) ("Request for Review" or "Review"). A copy of the Request for Review, as supplemented, is attached hereto as Exhibit 2.

³ *Id.* at 1-2, para. 1 (citing 47 C.F.R. § 54.720(b)). At the time that the Chawanakee appeal was filed, the deadline was thirty days from the date of the Schools and Libraries Division's decision. Currently, the deadline is sixty days.

⁴ *See also Center for Auto Safety v. National Highway Traffic Safety Admin.*, 244 F.3d 144, 150 (D.C. Cir. 2001); *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 29-30 (D.C. Cir. 1998).

⁵ Commission authority for the promulgation of Section 1.117 is set forth in Section 5(c)(4) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(4).